

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:F:BOS:POSTF-119588-02

BJLaterman

date: 7/19/02

to: Brenda Hollands, Team Manager, LMSB  
Group 1473

from: Associate Area Counsel, Boston  
CC:LM:FS:BOS

in re:

Form 872

Taxable Years ended December 31, [REDACTED] and [REDACTED]

This is in response to your request of March 26, 2002 that we give advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years ended December 31, [REDACTED] and [REDACTED]. This memorandum should not be cited as precedent.

We have reviewed the materials you initially provided and the additional information and documents subsequently provided. [REDACTED] (EIN [REDACTED]) was a Delaware corporation. It filed (as parent) a consolidated federal income tax return with its subsidiary, [REDACTED] (a Delaware corporation) (EIN [REDACTED]), for the taxable years ending December 31, [REDACTED] and [REDACTED]. These are the taxable years for which you wish to extend the statute of limitations.

[REDACTED] (EIN [REDACTED]) is a Delaware corporation which was formed on [REDACTED]. [REDACTED] was a Delaware corporation which was a wholly owned subsidiary of [REDACTED]. On [REDACTED] (according to [REDACTED]'s Consolidated Financial Statement), [REDACTED] acquired all the issued and outstanding stock of [REDACTED]. According to "A Statement Attached To And Made Part of Federal Form 1120 For The Year Ended December 31, [REDACTED]" for [REDACTED], the stock was acquired through a taxable stock purchase. On [REDACTED], [REDACTED] merged with and into [REDACTED] with [REDACTED] as the surviving corporation under the name of [REDACTED].

An Agreement and Plan of Merger (dated [REDACTED]) by [REDACTED] and among [REDACTED], [REDACTED], [REDACTED], [REDACTED], various shareholders and [REDACTED] was entered into by said parties. The Agreement and Plan of Merger indicates that the parties have approved the acquisition of [REDACTED] by [REDACTED] by means of the merger of [REDACTED] with and into [REDACTED], with [REDACTED] as the surviving corporation. This was to be immediately followed by the merger of [REDACTED] into [REDACTED] with [REDACTED] as the surviving corporation under the name [REDACTED] (new [REDACTED]). These transactions occurred on or about [REDACTED], with the result that new [REDACTED] is a wholly owned subsidiary of [REDACTED]. You seek advice as to who can extend on behalf of the [REDACTED] group for the taxable years ended December 31, [REDACTED] and [REDACTED] in view of the above-mentioned transactions.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. §1.1502-77(a). The common parent in its name will give waivers, and any waiver given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. §1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. §1.1502-77(a). Treas. Reg. §1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect to the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year are severally liable for the tax for such year. Treas. Reg. §1.1502-6(a).

Temp. Reg. §1.1502-77T provides exceptions to the general rule. Temp. Reg. §1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case. Temp. Reg. §1.1503-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more of the corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group.

Subparagraph(a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice of waiver applies. In this case, the common parent, [REDACTED] then known as [REDACTED], was merged into [REDACTED] and is no longer in existence. Therefore, this paragraph does not apply.

Subparagraph(a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. §381(a) applies. I.R.C. §381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. §361 (relating to non recognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph(A), (C), (D), (F) or (G) of I.R.C. §368(a)(1). According to the materials submitted, on or about [REDACTED], the common parent,

[REDACTED] then known as [REDACTED], merged into its wholly owned subsidiary, [REDACTED], with [REDACTED] as the surviving corporation. If the merger is an "A" reorganization, I.R.C. §381 will apply to the merger. If so, pursuant to Temp. Reg. §1.1502-77T(4)(ii), [REDACTED] would be an alternative agent for the consolidated group for the tax years ended December 31, [REDACTED] and [REDACTED]. Therefore, any waiver given by [REDACTED] with respect to those pre-merger years of the consolidated group would be deemed to be given by the agent of the group.

On or about [REDACTED], [REDACTED] then known as [REDACTED] merged into [REDACTED] with [REDACTED] (under the new name [REDACTED]) as the surviving corporation. If that merger was an "A" reorganization, I.R.C. §381 will apply to the merger. It is uncertain, however, whether the scope of Temp. Reg. §1.1502-77(T)(4)(ii) (which lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. §381 applies) extends to a successor to a successor to the former common parent in a transaction in which I.R.C. §381 applies. Accordingly, we do not believe it would be in the best interests of the government to rely upon this subparagraph in this case.

Subparagraph(a)(4)(iii) of Temp. Reg. §1.1502-77T lists as alternative agent the agent designated by the group under Treas. Reg. §1.1502-77(d). Treas. Reg. §1.1502-77(d) provides that if the common parent corporation dissolves, the common parent and/or the remaining members of the consolidated group may designate another member of the group to act as agent, subject to the approval of the District Director. In this case, there was no designation and, in fact, neither the parent nor the subsidiary is still in existence. Accordingly, subparagraph(a)(4)(iii) does not apply.

Subparagraph(a)(4)(iv) of Temp. Reg. §1.1502-77T lists as an alternative agent, the common parent of the group at the time the waiver is given if the group remains in existence under Treas. Reg. §1.1502-75(d)(2) or (3). In this case, there is no "F" reorganization or downstream transfer as described in Treas. Reg. §1.1503-75(d)(2) or reverse acquisition within the meaning of Treas. Reg. §1.1502-75(d)(3). Accordingly, subparagraph(iv) does not apply.

Since we have concluded that the subparagraphs of Temp. Reg. §1.1502-77T(4) do not apply or that we may not be able to rely on them in this case, there is no alternative agent for the [REDACTED] consolidated group.

Both [REDACTED] and new [REDACTED] are Delaware corporations. In this case since the mergers were effected under Delaware law, [REDACTED] (formerly known as [REDACTED]) formerly known as [REDACTED] is primarily liable for [REDACTED]'s (formerly known as [REDACTED]) debts, including taxes due while new [REDACTED] (formerly known as [REDACTED]) is primarily liable for old [REDACTED]'s (formerly known as [REDACTED]) formerly known as [REDACTED] debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). Section 259 of the Delaware General Corporation Law provides in part,

(a) When any merger or consolidation shall become effective under this chapter,... all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, §259(2001).

Accordingly, [REDACTED] (formerly known as [REDACTED]) formerly known as [REDACTED] is a successor in interest by merger to [REDACTED] (then known as [REDACTED]) while new [REDACTED] (formerly known as [REDACTED]) is a successor in interest to [REDACTED] (then known as [REDACTED]).

Based on the foregoing discussion, we recommend that you obtain a Form 872 from new [REDACTED]. We recommend the caption on the Form 872 read: [REDACTED] (EIN) formerly known as [REDACTED] (EIN) successor in interest by

merger to [REDACTED] (EIN) formerly known as [REDACTED]  
[REDACTED] (EIN) formerly known as [REDACTED]  
[REDACTED] (EIN) successor in interest by merger to [REDACTED]  
[REDACTED] (EIN) formerly known as [REDACTED]  
[REDACTED] (EIN). On the bottom of the form, you  
should add the following: \*This is with respect to the  
consolidated tax of the [REDACTED]  
[REDACTED] consolidated group for its taxable years ended December 31,  
and [REDACTED].

This Form should be signed by an authorized officer of the  
new [REDACTED] Rev. Rul. 83-41, 1983 C.B. 399, clarified and  
amplified by, Rev. Rul. 84-165, 1984-2 C.B. 305.

In addition, under I.R.C. §6901, [REDACTED] (formerly  
known as [REDACTED] formerly known as [REDACTED]  
[REDACTED]) is a transferee at law of [REDACTED]  
[REDACTED] (formerly known as [REDACTED]  
[REDACTED]) because [REDACTED] received the  
assets of [REDACTED] (formerly known as [REDACTED]  
[REDACTED] formerly known as [REDACTED]  
[REDACTED]) when [REDACTED]  
merged into [REDACTED] (formerly known as [REDACTED]  
[REDACTED] formerly known as [REDACTED])  
while new [REDACTED] (formerly known as [REDACTED]  
[REDACTED]) is a transferee of the transferee  
(formerly known as [REDACTED] formerly known as  
[REDACTED]) by virtue of its receipt  
of the assets of said corporation when said corporation merged  
into it.

A determination against the surviving corporation for tax  
due by the merged corporation for a period prior to the merger is  
not generally handled as a transferee case. Rather, it should  
generally be handled by asserting primary liability against the  
surviving corporation. There is an exception if the statutory  
period for assessing a deficiency has expired under primary  
liability; the Service would then argue that the surviving  
corporation should be liable as a transferee. See generally  
CCDM(35)(10)61. Therefore, it is generally preferable to assert  
primary instead of transferee liability against the surviving  
corporation, new [REDACTED], if the statutory period for  
assessing a deficiency has not expired under primary liability.  
However, in this case we recommend that you obtain Forms  
977(Consent to Extend the Time to Assess Liability at Law or in  
Equity for Income, Gift and Estate Tax Against Transferee or  
Fiduciary) and Form 2045(Transferee Agreement) from new [REDACTED]  
[REDACTED] in order to fully protect the government's interest. Please

feel free to contact the undersigned if assistance is required in the preparation of the transferee forms.

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual (IRM). Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letter should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the authorized manager should promptly sign and date it in accordance with Treas. Reg. §301.6501(c)-1(d) and IRM 121.2.22.3. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event that Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that §3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. §6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy the requirement, Publications 1035, "Extending the Tax Assessment Period," must be given when you solicit the statute extension.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as attorney client privilege. If disclosure becomes necessary, please contact this office for our views. If we can be of any further assistance, the undersigned can be reached at 617-565-7855.

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BARRY J. LATERMAN  
Special Litigation Assistant